SUPREME COURT, U. S.

No. 828

Office-Supreme Court, U.S.
FILED
DEC 11 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

MARTIN STERNBACK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit.

PETITION FOR A WRIT OF CERTIORARI

CHARLES A. BELLOWS
10 South LaSalle Street
Chicago, Illinois 60603
Attorney for Petitioner.

JASON E. BELLOWS
SHERMAN C. MAGIDSON
Chicago, Illinois
On the Brief.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinion Below 2

Jurisdiction 2

Questions Presented for Review 2

Statement of the Case 3

Reasons For Granting Writ 5

Conclusion 14

Appendix A—Opinion of the United States Court of Appeals for the Seventh Circuit ..... App. 1

Appendix B—Judgment Order Sought to be Reviewed ..... App. 9

CITATION OF AUTHORITIES

Cases

Amabile v. United States, Case No. 129, October Term 1968 Supreme Court of the United States 14

Cardinale v. Louisiana, Case No. 76 October Term, 1968, Supreme Court of the United States 6

Costello v. United States, 350 U.S. 359 8

Hoffa v. United States, 387 U.S. 231 9

Mancari v. Frank P. Smith, Inc., D.C.Cir., 114 F.2d 834 11

PAGE

McIntosh v. Pittsburgh Railways Co. —— Pa. ——, 4 Cr.L.2092 6

Pereira v. United States, 347 U.S. 1 12

Thompson v. Louisville, 362 U.S. 199 10

Tot v. United States, 319 U.S. 463 ..... 11, 12

Umans v. United States, 386 U.S. 940 8

United States v. Costello, 2 Cir., 221 F.2d 668 9

United States v. Shavin, 7 Cir. 287 F.2d 647 10

Wood v. Georgia, 370 U.S. 375 8

Miscellaneous

Model Code of Evidence, Rule 106(1)(b) 6

Uniform Rules of Evidence, Rule 21 ..... 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

MARTIN STERNBACK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Martin Sternback, hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the judgment of conviction of mail fraud entered against him by the United States District Court for the Northern District of Illinois, Eastern Division.

Opinion Below

The Opinion of the United States Court of Appeals for the Seventh Circuit is as yet unreported. It is reproduced herein as Appendix A.

Jurisdiction

The judgment sought to be reviewed was entered on October 14, 1968. A timely petition for rehearing was denied on November 14, 1968. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is Title 28, United States Code, Section 1254(1).

Questions presented for Review

1. Whether the trial court erred in ruling that if the petitioner had testified in his own behalf, he would have admitted in evidence against him for impeachment purposes, a twenty-five year old conviction for an entirely unrelated narcotics felony.

2. Whether the trial court upon petitioner's belated motion to dismiss, should have examined the minutes of the Grand Jury to determine whether the indictment was based upon rationally persuasive evidence. Testimony elicited at the trial disclosed the fact that of all of the witnesses who testified at the trial, only one appeared before the Grand Jury, that all the rest executed affidavits in the United States Attorney's Office rather than appear before the Grand Jury, and where the only showing of any evidence before the Grand Jury arises from the supposition that the affidavits were either read to the Grand Jury or their contents summarized by someone who appeared before the Grand Jury.

3. Whether the evidence was sufficient to sustain a conviction of the crime of mail fraud where the record is utterly devoid of any evidence that the petitioner devised a scheme to defraud. The evidence, when viewed in a light most favorable to the government, shows only that the petitioner was a physician; that certain of his patients were claimants in automobile accident cases; that insurance companies received from the claimant's lawyers medical reports and bills on stationery bearing the petitioner's printed letterhead and some bearing his facsimile signature; that while the reports and bills contained inaccurate statements describing the injuries of the patients and the number of visits by the patients to the petitioner, there was no evidence whatsoever that the petitioner authored the reports or the bills or caused any of the mailings charged.

Statement of the Case

The petitioner, sometimes hereinafter referred to as the defendant, was indicted by the Grand Jury of the United States District Court for the Northern District of Illinois, Eastern Division, for the crime of mail fraud in violation of Title 18, United States Code, Section 1341. The indictment contained 22 counts.

Briefly stated, the indictment charged that the defendant devised a scheme and artifice to defraud certain named and unnamed insurance companies and corporations. According to the indictment, the scheme was such that the defendant, a physician, would examine persons involved in automobile and other accidents; he would prepare medical bills containing false information; the defendant would cause to be furnished to attorneys representing the persons involved in the accidents with the false reports and bills; and lastly, that the defendant caused the attorneys to send the medical reports and bills to insurance firms, companies, associations and corporations.

To support the indictment, the government was able to prove only that the defendant was a licensed physician and surgeon; that he examined certain claimants in accident cases and that insurance companies and adjustors representing the defendants in the accident cases received from various lawyers, medical reports and bills on the letterhead of the defendant which medical reports and bills contained substantial inaccuracies.

The defendant was found guilty of 21 of the 22 counts, the count having been dismissed on motion of the government. He was ordered committed to the custody of the Attorney General for a period of two years on each of the counts on which he was convicted, said sentences to run concurrently with each other and he was fined a total of $5,000.

Reasons for Granting Writ

1. Prior to the conclusion of the government's case, counsel for the petitioner advised the trial court that the petitioner had been convicted of a non-related felony 25 years previously and requested a ruling as to whether the court would permit introduction of evidence of that conviction by the government to impeach the petitioner, should he testify. (App. 107 to 109) Counsel also advised the court, that should the court indicate that it would allow petitioner to be impeached by this conviction, he would "seriously consider not putting him on the stand." (App. 109).

Although the Court of Appeals evaded the question by holding that the trial court never made a definite ruling, this was not the position of the government in its brief. The government contended in the Court of Appeals that conviction of an infamous crime could be used for impeachment regardless of the age of the conviction and that it was improper for the petitioner here to have requested a ruling in advance without taking the witness stand.

There is no doubt that the trial court ruled that he would permit the government to use the prior conviction for purposes of impeaching the defendant's credibility as a witness. The court said:

> So I will rule as the decisions have held, Mr. Bellows. In other words, I will permit it irrespective of what my own personal views on it, because I have developed some views since [the case of *People* v. *Henneman*, 323 Ill.App. 124, 54 N.E.2d 745.] There has always been a question in my mind whether it is admissible or not when its real old. And the question is, where are you going to draw the line. When are you going to say, it's recent. * * *

The question raised here is similar in many respects to the case of *Cardinale* v. *Louisiana,* October Term 1968, No. 76, in which certiorari was granted by this court on November 25, 1968. In that case, the question before the court was whether evidence of prior crimes introduced for no purpose other than criminal disposition would violate the due process clause of the Fourteenth Amendment of the Constitution of the United States.

We submit that evidence of a twenty-five year old conviction has so little bearing upon present credibility that evidence of such a conviction has no purpose other than to show criminal disposition.

The rule that proof of prior convictions may be introduced in evidence for purposes of impeachment has come under recent attack. Both the Model Code of Evidence Rule 106(1)(b) and Uniform Rule of Evidence 21 make inadmissible evidence of the conviction of a crime "not involving dishcnesty or false statement."

Most recently, the Supreme Court of Pennsylvania was faced with the question of whether the trial court should have admitted proof of a damage claimant's 12-year old pandering conviction for purposes of impeachment. Said the Supreme Court of Pennsylvania in *McIntosh* v. *Pittsburgh Railways Co.* ..... Pa. ....., 4 Cr.L. 2092, "We are hard put to understand what relevance appellant's twelve year old pandering conviction could have in helping a jury ascertain whether his description of a trolley collision was true. After being released from prison, appellant for eight years, had apparently led an exemplary life. It seems unfair to plague appellant with his prior misdeeds in any way at all at this point. * * *.

"The logical connection between pandering and not testifying truthfully in auto accident litigation twelve years

later completely escapes us. It would be surprising if any statistical correlation at all could be found between panders of twelve years ago and witness-stand liars today. * * *"

The Court of Appeals in this case spoke approvingly of Rule 21 of the Uniform Rules of Evidence. That rule provides in part:

> If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

Nevertheless, the Court said that, "Injustice resulting from the existing rule would have to be much more apparent than in this case in order to justify changing the rule by decision of a particular appeal."

One is at a loss to perceive of a greater injustice than that of a defendant in a criminal case being forced to forego testifying in his own behalf for fear of the prejudice arising from the proof of his prior conviction.

In this case, the Court does not have to reach the constitutional question posed in *Cardinale* for it may decide the case under its power to supervise the administration of justice in the Federal Courts.

Because of the importance of the question, certiorari ought to be granted.

2. The second point concerns the sufficiency of the evidence before the grand jury. The question was raised in the District Court by the defendant's Petition for Relief from Waiver of Objection Based on Defect in the Institution of the Prosecution. The Petition was filed subsequent to the verdict in the case. It was based upon the fact as brought out in the trial of the case that none of the Government's witnesses who testified at the trial ever testified before the grand jury, with the exception of one

Hubert VanPatton, an insurance adjustor, who had no knowledge of the charges contained in the indictment.

This evidence creates a strong presumption that the indictment was not based upon "rationally persuasive evidence." *Costello* v. *United States,* 350 U.S. 359, 364, concuring opinion of Burton, J. As this court has said in a different context, "Historically [the grand jury], has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution. It serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia,* 370 U.S. 375, 390.

We do not contend here, as did the petitioner in *Costello,* that an indictment may not be based upon hearsay. Nor, do we as did the petitioner in *Umans* v. *United States,* cert. granted, 386 U.S. 940; cert. dismissed ..... U.S. ....., contend that hearsay information must be corroborated by other evidence or proof of the informant's reliability.

Our contention is based upon the test established by Mr. Justice Burton's concurring opinion in *Costello.* There he said:

> "[I]t seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen." 350 U.S. 359, at page 364.

The position which we take here is also in keeping with that adopted by the United States Court of Appeals for

the Second Circuit in the *Costello* case (*United States* v. *Costello,* 2 Cir., 221 F.2d 668). There Judge Learned Hand speaking for the Court said:

> "We should be the first to agree that, if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated." 221 F.2d 668, 677.

We are at a loss to understand the reluctance of the District Court and the Court of Appeals to inspect the grand jury minutes. It would have been a simple thing for either of those courts to have read the minutes and have made the determination that there was or was not any rationally persuasive evidence presented to the grand jury. If there had been such evidence the prosecution would have been in no way impaired. If there had not been, the defendant would be entitled to a dismissal of the indictment. There can be no reasons for the preservation of convictions obtained in contravention of well established and well regarded constitutional rights.

The relief sought here would not initially affect the validity of the petitioner's conviction. This court could either vacate the judgment below and remand the cause to the District Court with directions to conduct a hearing as in *Hoffa* v. *United States,* 387 U.S. 231, or it could direct the United States Attorney to certify and transmit the minutes of the proceedings before the grand jury to the Court for its examination. Either method would suffice to insure that the indictment in this case was founded upon rationally persuasive evidence.

3. Our last point concerns the sufficiency of the evidence to convict the petitioner. While we realize that ordinarily the sufficiency of evidence does not create a question of sufficient importance to warrant this court's in-

quiry, there are involved in this case serious doubts as to whether there was any evidence of the petitioner's guilt. *Thompson* v. *Louisville*, 362 U.S. 199. The factual situation is outlined in the statement of the case. The Court of Appeals said of the various false reports and bills:

> "[T]hat there is no testimony or other direct evidence that the documents were prepared by defendant or under his supervision, that he sent or mailed them to the attorneys, or that he was told what use the attorneys would make of them. In these respects, the government's case rested on inferences from circumstances."

For reasons best known to itself, the government did not choose to call as witnesses any of the persons who transmitted the reports and bills to the various insurance companies. The Court of Appeals concluded that:

> "there was sufficient proof from which to find beyond a reasonable doubt that Dr. Sternback authored the fraudulent bills and reports. The claimants saw him shortly after their accidents and told him their troubles. They testified in a number of instances that they were referred to him by their attorneys. The bills are consistent in some respects with the truth as known to Dr. Sternback, such as the dates of the first visits and the hospitalization of some of the claimants."

None of the information from which the Court of Appeals drew the conclusion of the defendant's guilt was known only to the defendant. Indeed this information was possibly better known to the claimants and their attorneys who stood to gain far more by the fabrication of spurious documents such as these. Such fabrication has not been beyond the experience of the courts. Cf. *United States* v. *Shavin*, 7 Cir. 287 F.2d 647, 649.

The Court of Appeals indulged in a presumption of a type which contravenes the due process clause of the Fifth

Amendment. The constitutional test is that a presumption cannot be sustained if:

> "there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Tot* v. *United States,* 319 U.S. 463, 467-468.

The only fact proved in this case was that insurance companies received certain purported reports and bills from certain attorneys, and that the reports were on stationery containing the petitioner's name. It cannot be said that merely because one's name is on a writing that he authored that writing. As the United States Court of Appeals for the District of Columbia said in *Mancari* v. *Frank P. Smith, Inc.,* D.C. Cir., 114 F.2d 834, 836:

> "The mere presence in printed material of the name of a particular person constitutes no substantial evidence that that person caused such material to be written or published."

In his dissent in that case, Justice Rutledge opined that:

> "there was nothing in the contents or in the advertising matter to indicate that another person was interested in the business, the product, the advertising or having it distributed."

From this dissent, may be derived the rule which we believe controls the present situation and that is that there can be no rational connection between the fact of the reports and bills on the letterheads of the petitioner and the ultimate fact that he authored them where there were others who had considerably more to gain by the fabrication of spurious documents who had a closer evidentiary connection with the documents. The Court of Appeals indulged itself in a presumption which in effect, shifts to

the defendant the burden of proving his innocence. As the Court said in *Tot*:

> "It would * * * be a convenience to the Government to rely upon the presumption and cast on the defendants the burden of coming forth with evidence to rebut it. But, as we have shown it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to the guilt of the offense, the occasion of casting on the defendant the obligation of exculpation. The argument from convenience is admissible only where the inference is a permissible one, where the defendant has more convenient access to proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship." 319 U.S. 463, 469-470.

This leads us to the second part of the point on the sufficiency of the evidence and that is that the government failed to prove the jurisdictional element of the crime charged that the petitioner caused the mailings charged in the indictment. There was no direct evidence of the fact that the petitioner knew that the persons whom he examined were going to present claims against the parties with whom they were involved in the accidents and consequently their insurance carriers. There is no direct proof that the petitioner knew that reports should be communicated to insurance companies as a basis for settlement negotiations.

This case is unlike *Pereira* v. *United States,* 347 U.S. 1, where the defendants could reasonably foresee that the mails would be used in execution of their scheme to defraud. There the defendants had procured a check by fraud. The check was drawn on an out of state bank and when they delivered it to a local bank for collection, they could reasonably foresee that the latter bank would use the mails, in the ordinary course of business, to collect from the out-of-state bank. In this case, the government

can point to no such foreseeable course of conduct. In negotiations over settlements for claims for personal injuries, it is just as foreseeable that the documents would be hand carried by the attorneys to the insurance companies; that the insurance companies would conduct its business through inter-office memos within the same building without the use of mail and that the attorneys would pick up the releases at the insurance companies' offices, call their clients to come into the office to sign them, hand-carry the releases back to the insurance companies pick up the checks, call their clients to come in and endorse the checks and receive their share of the recovery, deposit the checks in the bank and have checks sent through the central clearing house by means of private messenger without the mails being once used. Indeed, in a large metropolitan area such as Chicago, where the transactions in this case occurred, such procedures may likely be the rule, rather than the exception. In such case, the foreseeability of the use of the mails is very dim indeed.

We realize that in some polite circles it is deemed gauche to inveigh against incursions of federal power into local affairs. The crimes involved here have no great federal significance. Whatever Dr. Sternback's deeds were, they do not place the Union in jeopardy of dissolution. There is no showing that the State of Illinois could not have prosecuted just as easily as did the United States. There is no showing that state authorities were lax in prosecution of this category of crime. The United States Attorney in office at the time of this prosecution is now the State's Attorney of Cook County and there is no reason to believe that he will not prosecute as vigorously as State's Attorney as he did as United States Attorney.

At a time when it is being realized that the states must be made better able to confront the problems which face

this nation, it is most apparent that the government's position and that adopted by the Court of Appeals seriously endangers the constitutional relationships between the states and the federal government. There has been a disturbing tendency to create a general federal police power out of the limited powers delegated to the national government by the constitution. The use of such fictions as the foreseeability of the use of the mails is but one method of creating this general federal police power. The commerce clause has also been used to an extent greater than that ever contemplated by either the founding fathers or the proponents of such recent legislation as the Hobbs Act. See *Amabile* v. *United States* now pending in this court on petition for Writ of Certiorari, as Case No. 129, October Term, 1968.

Because of the importance of this case as it bears upon questions of federal jurisdiction and upon the state federal relationship, certiorari ought to be granted.

Conclusion

For the above and foregoing reasons, a Writ of Certiorari ought to issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case.

Respectfully submitted,
CHARLES A. BELLOWS
Chicago, Illinois
Attorney for Petitioner

JASON E. BELLOWS
SHERMAN C. MAGIDSON
Chicago, Illinois
On the Brief.

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1967 — APRIL SESSION, 1968

No. 16259
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MARTIN STERNBACK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 14, 1968

Before HASTINGS, FAIRCHILD and CUMMINGS, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* Dr. Martin Sternback was charged with 22 offenses against the mail fraud statute.[1] Each count alleged that Sternback caused delivery by the post office of a letter, in each case for the purpose of executing a scheme to defraud, described in detail. Count 17 was dismissed on motion by the government. Sternback was convicted on all other counts, and has appealed.

Condensed and summarized, the description of the alleged scheme to defraud was as follows:

[1] U.S.C. sec. 1341.

Defendant Sternback, a physician, would examine claimants who had been involved in automobile accidents. He would cause medical reports and medical bills to be prepared, each containing false representations. He would cause these reports and bills to be furnished to the attorneys representing the claimants and to be sent by the attorneys to the insurance and other firms who were the intended victims of the scheme.

The evidence in support of each count varied in detail, but presented a similar pattern. The claimant or claimants involved in the particular count testified that after being in an accident he consulted an attorney and later consulted Dr. Sternback, saying in some cases that the attorney referred him to Dr. Sternback. The claimant described his complaints, the number of visits to Dr. Sternback's office, and the treatments given.

A representative of the insurance company or other company involved produced a carbon copy of a medical report and medical bill, and testified that these came from claimant's attorney and the claim was settled in reliance on them. The documents appeared to be copies of Dr. Sternback's medical report and the bill for his services.

If the testimony of claimants is correct, as the jury believed, the number of visits charged for at $10 per visit was substantially inflated in each bill and the complaints and treatment furnished were exaggerated in each report.

It was stipulated that various letters were received through the mail, as alleged. In each case the mailing occurred at some stage of the negotiations for settlement, some letters being addressed to the insurance company or its representative, some to claimant's attorney.

Defendant concedes that there was sufficient proof that the bills and reports contained false statements and that the insurance companies relied on them. He contends there was insufficient proof that he authored the fraudulent papers, that he furnished them to the attorneys, that he caused them to be sent to the insurance companies, or that he caused the mailings charged and proved. He also contends that the district court erred in a ruling on anticipated evidence and in denying disclosure of grand jury proceedings for the purpose of challenging the indictment.

Defendant's three contentions, and our dispositions of them, are as follows:

1. *Insufficiency of the evidence.*

Each of the purported medical bills is on a printed form of statement, with Dr. Sternback's name, address and phone numbers printed at the top. Each of the purported medical reports is on letterhead stationery, with Dr. Sternback's name and two addresses printed at the top. The format of the letterhead appearing in counts 19, 20, and 21 is slightly different from the stationery appearing in the other counts, but the substance is the same. Each report is typed in the form of a letter addressed to the claimant's attorney. Each bears a purported signature "Martin Sternback, M.D.", affixed by rubber stamp.

Defendant correctly asserts that there is no testimony or other direct evidence that the documents were prepared by defendant or under his supervision, that he sent or mailed them to the attorneys, or that he was told what use the attorneys would make of them. In these respects the government's case rested on inferences from circumstances.

Assuming that defendant authored the bills and reports, inflating the number of visits and the charges which resulted, and exaggerating the claimants' injuries, the only reasonable inference would be that defendant intended to provide ammunition for the attorneys in obtaining more money in settlement from those who might be responsible for the accidents.[2]

The reports were addressed to the claimants' attorneys, were sent by the attorneys to the adjusters, and there was correspondence by mail at various stages of achieving the settlements. One in defendant's position must know that such correspondence was probable and almost necessary in executing the scheme to defraud whoever was going to pay the claims. It is not necessary, in a prosecution under this statute, to show that defendant specifically authorized the various letters to be sent; "it is enough if he knows that in the execution of the scheme letters are likely to be mailed, and if in fact they are mailed."[3]

We think that there was sufficient proof from which to find beyond a reasonable doubt that Dr. Sternback authored the fraudulent bills and reports. The claimants saw him shortly after their accidents and told him their troubles. They testified in a number of instances that they were referred to him by their attorneys. The bills are consistent in some respects with the truth as known to Dr. Sternback, such as the dates of the first visits and the hospitalization of some of the claimants.

---

[2] After the district court disposed of the case he ordered the United States attorney to deliver copies of the statements of witnesses to the Committee on Inquiry of the Chicago Bar Association.

[3] *United States* v. *Cohen* (2nd Cir. 1944), 145 F.2d 82, 90, cert. den. 323 U.S. 799.

Count 2 involved claimant, Carlsen, who testified he saw Dr. Sternback three times. The bill listed ten office visits and charged $100. Carlsen testified that on the first visit Dr. Sternback "told me that I was smart enough to keep my mouth shut . . . and . . . the visits were going to be pre-determined at $100, $10 a visit." This testimony, coupled with the other evidence as to count 2 would probably support a finding that Dr. Sternback must have been the author of the Carlsen bill, independently of the evidence with respect to other counts.

But in addition, when all the facts are considered together, it would be wholly unreasonable to believe that anyone other than Dr. Sternback, or someone under his supervision, prepared the bills and reports.

The accidents involved ranged in date from January, 1962 to April, 1964; the settlements from June, 1962 to January, 1966. The respective pairs of bills and reports were forwarded to the companies at dates ranging from April, 1962 to July, 1964. Nine different law offices handled one or more claims. Thirteen different insurance companies and a bus company received and relied on the documents. Dr. Sternback examined every claimant but no other individual or organization was involved in every one of the claims. The largest number handled by any law office was five. The proposition that someone else prepared the bills and reports without his participation is purely fanciful.

2. *Colloquy concerning use of conviction to impeach defendant.*

Defendant did not testify. His counsel suggests that he may have so chosen because a narcotics felony conviction, sustained twenty-five years earlier, would be introduced to impeach him. Counsel asserts that the district court erroneously ruled that the government would be permitted to introduce the conviction.

At a recess during the government's case, defense counsel informed the court of the conviction and asked for an expression by the court. He indicated that if the conviction were to be allowed in evidence, he "would seriously consider not putting him on the stand."

A brief informal discussion between court and both counsel followed, and several decisions of this and other courts were referred to. The court indicated that there was a question in his mind whether a conviction is admissible if very old. Defense counsel interprets one statement by the court as a definitive ruling that the conviction would be admitted notwithstanding the court's doubts. If it stood alone, the statement would so indicate. The court had, however, indicated uncertainly about the decisions on the point, had said, "We will check it out", indicated he had not read the decisions cited, and (probably because defendant cited cases from another circuit) had twice said he would rule in accordance with the decisions of this court.

The district court was being asked for a ruling in advance. We think he made it sufficiently clear that he wanted to read the pertinent decisions of this court before making up his mind. Although the district court did not refer to the question again, defense counsel did not pursue the matter during the remainder of the trial, nor did he include this claim among the grounds on which he moved for a new trial.

We think the district court could properly have excluded the conviction as too remote if in his discretion he found that under the circumstances it lacked probative value.[4] This court has said, in a case where a 20 year old conviction of rape had been admitted to impeach a defendant: "How-

---

[4] See McCormick, Evidence (1954), p. 91.

ever, the rule appears to be firmly established in federal courts that the matter of the admission of such testimony is solely within the discretion of the trial judge.'"[5] In a later case this court declined to find error in admitting an eleven year old felony conviction to impeach defendant, but did not hold the trial court could not have excluded it.[6]

In the circumstances presented here, however, defendant is in no position to contend that he was prevented from testifying in his own behalf by an erroneous ruling. Perhaps a defendant should not be permitted to raise the point on appeal except where he had taken the stand and a former conviction has been used, over his objection. But at the very least, if this defendant's fear of the use of the conviction was indeed the reason why he decided not to testify, it was incumbent upon counsel to pursue the question and obtain a definitive ruling.

The problem posed by the fact that an innocent defendant may decide not to testify because of the damage a past conviction will do him is thorny.[7] Rule 21, Uniform Rules of Evidence, provides in part:

> " . . . If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility."

The author of this opinion, speaking individually, holds the view that the proposed rule is sound policy and ought

---

[5] *United States* v. *Pinna* (7th Cir. 1956), 229 F.2d 216, 219.

[6] *United States* v. *Plata* (7th Cir. 1966), 361 F.2d 958, 962.

[7] See McCormick, Evidence (1954), p. 93.

to be adopted by legislation or exercise of judicial rule making power. But injustice resulting from the existing rule would have to be much more apparent than in this case in order to justify changing the rule by decision of a particular appeal.

3. *Defect in institution of the prosecution.*

One month after the verdict, defendant filed a petition seeking disclosure of the grand jury proceedings in order to discover whether there was sufficient evidence before the grand jury. He asked relief from his failure to raise an objection before trial on the ground that he learned the relevant facts after the trial began.

What defendant learned from cross-examination of government witnesses was that none had appeared before the grand jury and the claimants had all given the government sworn statements in lieu of personal appearance before the grand jury. It also appeared there had been an investigation by a postal inspector and a private investigator employed by several insurance companies. Defendant concedes that hearsay may be a sufficient basis for an indictment.[8] He points out no reason for believing that the government did not have possession of sufficient information on which an indictment could have been reasonably based, or that the government failed to present it or the grand jury to consider it. He suggests only the possibility that it was not properly presented or considered.

We are inclined to believe it would have been an abuse of discretion, under these circumstances, to have permitted

---

[8] *Costello* v. *United States* (1956), 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 397.

disclosure under Rule 6(e) F.R.Cr.P., but in any event it was not an abuse of discretion to deny it.[9]

The judgment is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

---

[9] See *United States* v. *Bitter* (7th Cir. 1967), 374 F.2d 744, 748, rev'd on other points, 389 U.S. 15, 88 S.Ct. 6, 19 L.Ed.2d 15.

APPENDIX B

Judgment Order Sought To Be Reviewed

This Cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, It Is Ordered And Adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	4
Conclusion	10

CITATIONS

Cases:

Bannister v. *United States*, 379 F. 2d 750 certiorari denied, 390 U.S. 927	9
Claunch v. *United States*, 155 F. 2d 261	6
Costello v. *United States*, 350 U.S. 359	8
Lawn v. *United States*, 355 U.S. 339	8
Pereira v. *United States*, 347 U.S. 1	9
State of Louisiana v. *Cardinale*, 251 La. 827, 206 So. 2d 510, certiorari granted, November 25, 1968, No. 76, this Term	6
United States v. *Grow*, 394 F. 2d 182, certiorari denied, October 14, 1968, Nos. 264, 275, this Term	9
United States v. *Pinna*, 229 F. 2d 216	6
United States v. *Shavin*, 287 F. 2d 647	9

Statutes:

18 U.S.C. 1341	2
26 U.S.C. 4705(a)	5

Miscellaneous:

McCormick, *Evidence* 91 (1954)	6

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 828

MARTIN STERNBACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 402 F. 2d 353.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1968. A petition for rehearing was denied on November 14, 1968. The petition for a writ of certiorari was filed on December 11, 1968. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge's treatment of petitioner's contention that a prior conviction was too remote in time to be admissible for impeachment was justified.

2. Whether the indictment was subject to post-conviction attack on the ground that witnesses who testified at trial and who had given statements to an investigator before trial, did not testify before the grand jury.

3. Whether the evidence supports the verdict.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on twenty-one counts of mail fraud (18 U.S.C. 1341). On April 11, 1967, he was sentenced to concurrent two-year terms and fined $5,000. The court of appeals affirmed (Pet. App. 1-9).

The evidence showed that from January 1962 to April 1964, various lawyers in Chicago referred clients who had been accident victims to petitioner, a physician, for treatment. On their first visit the clients were given a limited physical examination. In every case these clients made some return visits to petitioner's office. Some were ordered hospitalized for approximately one week. Petitioner, however, exaggerated the number of office visits on the medical bills

he submitted to the attorneys and provided false diagnoses and misrepresentations of the treatment he administered on the medical reports he submitted. These medical reports and bills were then mailed by the various attorneys to the insurers involved, and were a primary factor relied upon by the adjusters in arriving at an amount deemed appropriate in settlement of the accident claims.

A typical example of petitioner's pattern of conduct was the case of Ronald J. Carlsen. After being struck by a bus, Mr. Carlsen consulted an attorney, who referred him to petitioner (A. 44).[1] Carlsen visited petitioner on the day of the accident or the following day, at which time petitioner examined his arm, neck, and ear. Carlsen subsequently made two more visits to petitioner's office for examinations. But the bill petitioner submitted to Carlsen's attorney listed ten office visits, totalling $100. At trial Carlsen testified that on his first office visit petitioner "told me that I was smart enough to keep my mouth shut . . . and . . . the visits were going to be pre-determined at $100, $10 a visit" (A. 44). Petitioner prepared a medical report, stating that sedatives and anti-spasmodics had been given Carlsen for pain, and that diathermy treatments had been applied to contused portions of the victim's body (A. 47). In fact, the medical care Carlsen received was limited to the physical examinations (A. 44).

---

[1] Citations are to "Appellant's Appendix," filed with the Clerk of this Court.

ARGUMENT

1. During the government's case, defense counsel asked the trial judge whether, if petitioner were to take the witness stand, the government would be allowed to use a 25-year old narcotics conviction for impeachment purposes (A. 107-108). If so, said counsel, he would seriously consider keeping petitioner off the stand. The court told counsel "We will check it out." (A. 108). Government counsel cited cases from the Seventh Circuit tending to approve the admission of prior convictions in this situation (A. 109). The court then declared that it would follow the law of the jurisdiction (A. 109):

> If the law is as stated so far, without my reading the decisions, it seems I will have to permit the Government to do it if they intend to do it.

The matter was not discussed again for the remainder of the trial. Petitioner did not testify in his own behalf. On appeal, petitioner argued that the trial court had erred in "ruling" that the prior conviction was admissible to impeach him.

As the court of appeals observed, the entire context of the discussion of the issue reveals that the district judge did not, in fact, rule on the admissibility question at that preliminary juncture. The informal colloquy between court and counsel on the prospective issue of admissibility cannot be elevated to the stature of a hearing on a motion, appropriately and timely made, which resulted in a binding ruling. The judge's statements demonstrate that he was concerned about the problem, was sympathetic to petitioner's contention,

but deferred making a final ruling until he had an opportunity to read the relevant case law and until the question was squarely presented.[2] But defense counsel did not pursue the matter later and petitioner did not take the stand. Thus, the trial court had no occasion to make a considered ruling on the issue.

The most that could be said of the judge's statements is that he was suggesting a tentative ruling which he, in his discretion, thought it inappropriate to finalize at that time. The admissibility of a prior conviction turns on its relevance and its probative value on the question of the defendant's credibility. Here, petitioner, a physician, was accused of misusing his professional status in a fraudulant scheme. His prior conviction involved the unlawful dispensing of narcotics without a proper order form, in violation of the forerunner of 26 U.S.C. 4705(a). If petitioner had sought to rely on his professional status to refute the instant charges, the earlier conviction might well have been relevant to such a defense. Without hearing petitioner's testimony, and in the absence of even a proffer of what his testimony would be, the court could not have been expected to rule that the mere age of the prior conviction rendered it absolutely inadmissible. The admission of that prior offense, coupled with a jury instruction on its limited purpose, might well have been a proper exercise of discretion.

---

[2] Compare the court's tentative assurance on this matter, "We will check it out," with its denial of petitioner's motion to dismiss for lack of evidence before the grand jury: "That motion will be denied, Mr. Bellows. I have checked it out." (A. 164).

See *United States* v. *Pinna*, 229 F. 2d 216 (C.A. 7); *Claunch* v. *United States*, 155 F. 2d 261 (C.A. 5); McCormick, *Evidence* 91 (1954).

Petitioner suggests (Pet. 6) that *State of Louisiana* v. *Cardinale*, 251 La. 827, 206 So. 2d 510, certiorari granted, November 25, 1968 (No. 76, this Term), presents an issue similar to that raised here. But in that case, where the defendant was convicted of murder and sentenced to death, there was testimony that defendant voluntarily surrendered to police in Tucson, Arizona, who knew nothing of the defendant or the crime he had committed, and volunteered a statement. In the course of testifying at trial to the contents of the statement, the police officers referred to defendant's admission to them that, several months before, he had been convicted of sodomy and had thereafter sought out the prosecutrix in that case with intent to kill her. The issue presented in *Cardinale* is whether the defendant was deprived of a fair trial because of the admission in evidence of his entire confession, as required by state law, thereby providing the jury with the damaging recital of the unsuccessful attempt to kill. That issue is quite distinct from the question of the admissibility of evidence of a prior conviction for impeachment purposes.

2. Neither before nor during trial did petitioner challenge the sufficiency of the indictment or the foundation for it. One month after the guilty verdict, petitioner filed a "Petition for Relief from Waiver of Objection Based on Defect in the Institution of the Prosecution," alleging that facts first learned at trial gave him reason to believe that the indictment was not

founded on sufficient evidence. His prayer was based on the fact that, during the trial, a number of the forty-six prosecution witnesses—not including an investigating agent, Charles Botkin—were asked whether they had appeared before the grand jury. Only an insurance adjuster replied that he had (A. 73). The others replied in the negative, indicating, however, that they had given a statement to Botkin or a Mr. Culkin. At a hearing on this motion petitioner acknowledged that he had no authority to support his claim to relief in those circumstances, and the court denied the motion, stating "I have checked it out." (A. 164).

Even if it had been timely made, the motion to dismiss the indictment on the grounds alleged was without merit. Petitioner did not ask all of the government witneses whether they had testified before the grand jury, and the record does not state whether any who were not asked did appear. The record does indicate that the government intended to elicit from its last witness, Mr. Botkin, the fact that he *had* testified before the grand jury, and had presented to that body the results of his investigation and the statements of the other witnesses who testified at trial but not before the grand jury; but a defense objection to such testimony was sustained (A. 159-160, Tr. 630). The witnesses' statements, together with the testimony of the insurance adjuster and Botkin, provided sufficient "rational evidence" for the indictment. No one of the patients had the kind of unique knowledge which would make his personal testimony necessary or very desirable for the grand jury's deliberations. It

was the combination of the statements as to the number of visits each patient said he had made, plus the pattern of inflated reports, which showed the fraud. The investigator and the adjuster were the logical persons to present that evidence. See *Lawn* v. *United States*, 355 U.S. 339, 349; *Costello* v. *United States*, 350 U.S. 359, 364.

3. The record amply supports the jury's verdict that petitioner engaged in an unlawful scheme to defraud insurance companies and the Chicago Transit Authority, and caused the mails to be used in the execution of that scheme. The consistent pattern of the scheme was described by twenty-six accident victims, who initially came to petitioner on advice of their counsel, and ultimately received less medical care and made fewer office visits than petitioner represented in his medical reports and bills. These medical statements composed by petitioner were prepared over a period exceeding two years, from April 1962 to July 1964.

Petitioner's challenge to the sufficiency of the evidence appears to be twofold: that the government failed to establish (1) that the medical reports were prepared by petitioner, or (2) that he caused the mailing of these reports to the insurers. The first contention invites the Court to ignore reality. The medical reports and bills were on stationery containing petitioner's name and the stamped signature "Martin Sternback, M.D." Petitioner was identified by all of the accident witnesses as the doctor who had examined them. Although some of the dates listed on the bills were fictitious, in each case the date listed for the first visit or for any hospital visits corresponded to the

testimony of the witnesses. The bills and reports were sent to thirteen different insurance companies and a bus company from nine different law offices. From these circumstances, the jury was warranted in concluding beyond a reasonable doubt that only petitioner could have been the source of the medical bills and reports. Indeed, as noted by the court of appeals (Pet. App. 5) any other conclusion would have been "purely fanciful." See *United States* v. *Shavin*, 287 F. 2d 647, 652 (C.A. 7).

Petitioner's allegation regarding the absence of direct evidence that he contemplated that the medical reports would be transmitted to the insurers via the mails is also unrealistic, in view of the duration of the scheme and the number of individuals and reports involved. The jury was entitled to infer that petitioner reasonably contemplated that the reports would be sent through the mails, as indeed they were. *Pereira* v. *United States*, 347 U.S. 1, 8; *United States* v. *Grow*, 394 F. 2d 182, 205 (C.A. 4), certiorari denied, October 14, 1968 (Nos. 264, 275, this Term); *Bannister* v. *United States*, 379 F. 2d 750 (C.A. 5), certiorari denied, 390 U.S. 927.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

JANUARY 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 330126 407